

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

AC SPECIALISTS, INC.

and

Case 12-CA-76395

UNITED ASSOCIATION OF PLUMBERS, PIPEFITTERS
& HVAC REFRIGERATION MECHANICS, LOCAL
UNION 123, UNITED ASSOCIATION OF JOURNEYMEN
AND APPRENTICES OF THE PLUMBING AND PIPE
FITTING INDUSTRY OF THE UNITED STATES AND
CANADA, AFL-CIO

Christopher C. Zerby, Esq., for the General Counsel.
Thomas M. Gonzalez and Matthew Evans, Esqs.,
for the Respondent.
Brian A. Powers, Esq., for the Charging Party.

DECISION

Statement of the Case

GEORGE CARSON II, Administrative Law Judge. This case was tried in Tampa, Florida, on August 13 and 14, 2012, pursuant to a consolidated complaint that issued on May 30, 2012.¹ The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) in several respects, Section 8(a)(3) of the Act by discharging three employees because of their union activity, and Section 8(a)(5) of the Act by failing and refusing to bargain with the Union. It seeks a bargaining order as a remedy for the foregoing alleged unfair labor practices. The answer of the Respondent denies any violation of the Act. I find that the Respondent violated the Act substantially as alleged in the complaint and that a bargaining order is warranted.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following²

Findings of Fact

I. Jurisdiction

The Respondent, AC Specialists, Inc., the Company, is a Florida corporation with an office in Tampa, Florida, engaged in providing heating, ventilation, and air conditioning services to residential and commercial customers. The Respondent annually derives gross revenues in

¹ All dates are in 2012, unless otherwise indicated. The charge in Case 12-CA-76395 was filed on March 12 and amended on April 2 and April 25.

² The Charging Party's unopposed motion to correct the transcript by inserting the word "not" between the words "had" and "performed" at page 59, line 22, of the transcript is granted.

excess of \$500,000 and purchases and receives goods valued in excess of \$5,000 directly from points outside the State of Florida. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that United Association of Plumbers, Pipefitters & HVAC Refrigeration Mechanics, Local Union 123, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Overview

The Respondent is a family owned company. David Winston, the former owner, began operating it in 1994. In 2007, his son, Timothy (Tim) Winston, became the owner. David Winston continued to be involved in the operations of the Company. His daughter, Kristy Winston, works in the office, dispatching service technicians, paying bills, and dealing with customers. His wife, Mary F. (Fran) Winston, works when needed, performing the same work as Kristy Winston. In February and early March, there were three service technicians, James Stahl, Jerome Gordon, and Michael Noel. When necessary, Tim Winston worked as a service technician.

The critical events occurred in a less than 2-hour period on March 9, 2012. The three service technicians employed by the Company all signed union authorization cards on February 23. On the morning of March 9, Union Organizer Russell Leggette and Local 123 President Todd Vega went to the Company's office. Exactly what was said in their short visit is in dispute. They departed. Shortly thereafter, the three service technicians were discharged. Gordon and Noel were reinstated about a month after they were discharged. Stahl was not.

The complaint alleges that the following unit is appropriate for collective bargaining:

All full-time and regular part-time service technicians employed by Respondent at its Tampa, Florida facility, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

The Respondent's amended answer admits that the foregoing unit, absent James Stahl who the Respondent contends was a supervisor, is appropriate. I shall first deal with the supervisory contention and then address the unfair labor practice allegations.

B. Supervisory Status of James Stahl

The Respondent's answer and amended answer to the complaint plead that Stahl is a supervisor. Tim Winston, at the hearing, asserted that Stahl was service manager. In two affidavits given prior to the hearing, one in the initial investigation and another prior to a 10(j) proceeding in this matter, he made no such assertion, stating that Stahl was a service technician. David Winston never made that assertion. He testified that the Company had three service technicians, Stahl, Gordon, and Noel. Although David Winston initially claimed that Stahl could terminate employees, he amended that claim, explaining that Stahl "could terminate them if he wanted to, but he had to come to us first." Stahl credibly denied having any such authority, and I credit that denial. Testimony relating to a statement by Stahl that the Company should fire Gordon and Noel, a recommendation that was neither accepted nor implemented,

confirms that Stahl had no authority to discharge or effectively recommend discharge insofar as neither Gordon nor Noel were fired. David and Timothy Winston made the decisions.

Tim Winston claimed that he told Stahl that he was service manager and had informed Gordon and Noel of that fact. I do not credit that testimony. As pointed out in the brief of the General Counsel, Tim Winston's attempt to explain why he did not identify Stahl as service manager in his affidavits was that his belief that he was service manager did not occur until "once I got the definition of everything." That would have occurred only after the charges herein had been filed. Stahl credibly denied that he was ever service manager, explaining that he had twice sought a promotion to that position but that the position had been denied. Both Gordon and Noel credibly denied that they were ever informed that Stahl was service manager.

Stahl credibly denied that he possessed or exercised the authority to hire, discharge, promote, reward, or adjust the grievances of the other service technicians. There is no probative evidence to the contrary, nor is there any evidence that he had the authority to transfer, suspend, lay off, or recall an employee.

Tim Winston claimed that his sister, Kristy Winston, did "some of the dispatching, but if Jim [Stahl] was there and she was answering the phone, he would dispatch." When Fran Winston was asked whether anyone other than Kristy Winston and herself dispatched, she answered, "No." Stahl acknowledged that, on "four or five" occasions when Kristy left the office for a short period of time, he had dispatched. He noted that Kristy Winston, before she left, would "tell me who was available next."

The Board, in *Oakwood Healthcare, Inc.*, 348 NLRB 686, 689 (2006), held that the term "assign" referred to "designation of significant overall duties . . . not to the . . . ad hoc instruction that the employee perform a discrete task." Stahl's dispatching was only occasional and was performed in accordance with the instructions given to him by Kristy Winston. There is no evidence that Stahl had the authority to assign employees. His occasional dispatch of another service technician in accord with Kristy Winston's instructions, at best, constituted an "ad hoc instruction," not assignment of "significant overall duties." Dispatching was the responsibility of Kristy and Fran Winston, not James Stahl.

Stahl, who had been exposed to selling techniques at a prior employer, obtained videos from a thrift shop of a "training series by Charlie Greer" relating to selling techniques. He suggested to David and Tim Winston that the techniques could increase sales for the Company, and they agreed. During the last few weeks of his employment, those videos were shown. Stahl, Gordon, and Noel watched them. Contrary to the testimony of Tim Winston, Gordon, Noel, and Stahl recall that he attended some of the sessions. Stahl reviewed invoices to determine whether a particular customer should be approached regarding the sale of additional equipment or services. I note that there is no claim that Stahl gave any training; the videos gave the training. Seeking to make sales does not confer supervisory authority. There is no evidence that attendance at the showing of the videos was mandatory. No directives were given to employees that they follow any specific procedure suggested in the videos.

Tim Winston and Stahl agree that Stahl had limited authority to negotiate prices, such as agreeing to do work for less than the customary charge or selling a system at a higher price. Authority related to prices does not establish authority related to people. Stahl had no authority over his fellow service technicians.

Tim Winston claimed that Stahl was in charge of safety meetings. Stahl and Noel both credibly testified that Tim Winston ran those meetings. I credit Stahl and Noel.

Tim Winston also noted that Stahl had suggested placing all service technicians on a commission, rather than hourly pay basis, in order to increase productivity. That suggestion was accepted by him and his father, David Winston. Employees, at some time in the past, had been compensated on a commission rather than on an hourly basis. The acceptance of that suggestion, indeed the acceptance of any suggestion by an employee, does not establish supervisory authority over employees.

The burden of establishing supervisory status is upon the party asserting that status. The Respondent has not met that burden. David and Tim Winston made the decisions. Stahl was not a supervisor and should not be denied the protections of the Act.

C. Facts

The three service technicians signed union authorization cards on February 23. Union Organizer Russell Leggette told them that the Union could seek recognition by an election or use the cards to seek recognition but that he needed to check with the Union's attorney because "labor laws were changing at that time." Stahl told Leggette that the employees did not want him to do anything immediately, that they wanted to get "our next paycheck and . . . figure out how we wanted to approach this." On March 5, Stahl told Leggette that the employees wanted him to "take the cards" and do whatever was necessary to seek representation." Leggette recalled that he spoke with each of the service technicians rather than only Stahl. I find that he was mistaken in that regard.

Stahl informed Gordon and Noel that Leggette would contact the Company on March 9, and cautioned them that David Winston might fire them. The service technicians carried personal tools with them on the company trucks. Noel, anticipating a worst case scenario, removed many of his personal tools from his truck on the evening of March 8.

On March 9, Leggette and Local 123 President Todd Vega went to the Company's office. Upon entering, they observed two women, Fran Winston and Kristy Winston, at desks to the left of the door through which they had entered. They asked to speak with Tim Winston. Kristy Winston called out to him, and Tim Winston came out of an office on the right. Whether Vega remained at door throughout the conversation or stood near Leggette is immaterial insofar as it is undisputed that Leggette was the spokesman and that Vega said nothing.

Leggett introduced himself and Vega and stated that they were from Plumbers and Pipe Fitters Local 123 and were out talking to union contractors. Tim Winston replied that "he was doing fine and didn't need any help from the Union." At that point, David Winston came out of the office on the right and stated the "he wasn't hiring any union people here and he had no use for the union." Leggette replied that was "fine with him, but his employees wanted to be in the Union." David Winston responded saying that Leggette "had never spoken to his employees." Leggette replied that he had. David Winston asked "where and when." Leggette answered that that "was none of his business." Leggette told David Winston that "his employees wanted Local 123 to be the collective bargaining agent for terms and wages and conditions of employment" and "either wanted to have an election or for him to recognize Local 123 as a majority status based on the authorization cards." David Winston again asserted that Leggette had not talked to his employees. Leggette "then offered the authorization cards out on a yellow tablet" and asked David and Tim Winston if they wanted to look at them. They said they did. After looking at the cards, David Winston said, "[F]uck the Union. The unions have ruined this country." He told Leggett and Vega to leave, and they did so.

Although David Winston denied that Leggett stated that the Company could “recognize us [the Union] or we could have an election,” he admitted that he heard Leggette say to Tim Winston, “we want you to recognize the Union.” He recalled that was what Leggette “first started saying when he was talking to Tim.” Tim Winston was asked whether he
 5 recalled that Leggett informed him that “the employees have authorized the Union to represent them.” Tim Winston admitted that he “said something like that, yes, sir.”

Although Fran Winston denied seeing the authorization cards, she acknowledged that she heard “them,” actually it was Leggette, say, “your employees have signed authorization
 10 cards to authorize the Union to represent them.” Kristy Winston did not testify.

Vega acknowledged that he did not hear Leggette mention an election or request recognition. Vega explained that he was focused on David Winston who was agitated, that throughout his conversation with Leggette, David Winston was “walking back and forth.”
 15

David and Tim Winston dispute that Leggette showed the cards to them. Both acknowledge that Leggette had cards in his hand that he was “shuffling around.” Vega credibly testified that Leggette held the cards up for the Winstons to see, “they were fanned out under his thumb.” I credit Leggette. David Winston admitted that Leggette told
 20 Tim Winston that he wanted the Company to “recognize the Union.” There was no reason for Leggette to present the cards except to show that the employees had authorized the Union to represent them. Whether the Winstons looked at the cards is immaterial.

Immediately after Leggette and Vega departed, David Winston called service technician Jerome Gordon and asked, “[W]hat is this union stuff.” Gordon answered that “we’ve been talking to them.” David Winston asked, “[W]e?” Gordon answered, “Yeah, me, Jim [Stahl] and Mike [Noel].” David Winston asked what he meant by “talking to them.” Gordon answered that “we joined the Union.” David Winston said, “[W]ell, we are not a union shop. So please return to the shop with your truck.”
 25
 30

Gordon recalled that David Winston asked him who was “this Union guy that I’d been talking to.” Gordon replied that he had talked with Leggette. David Winston stated that “there wasn’t going to be union here, this isn’t a union shop, and if I wanted to be in a union, then I need to go get a union job.” David Winston repeated that “they weren’t going to be union,” that Gordon “needed to decide what I’m going to do.” Gordon remained silent and Winston told him “to call him back once I decided what I want to do.”
 35

Gordon called back and spoke with Tim Winston. He told him that he “wanted to be union.” Tim Winston asked whether he wanted him to “run my service call and then turn my van in, or did I want to turn my truck in now.” Gordon replied that “if I’m being fired, then I should turn my truck in now.”
 40

Tim Winston recalled that, when Gordon called him, he asked what was going on. Tim Winston replied that there were “some guys here earlier.” He claimed that Gordon replied that he was “going to work for the Union.” Tim Winston claims that he asked Gordon how he could “work for the Union and me both at the same time”
 45

Gordon dropped off his personal tools at his cousin’s house, met Stahl at a nearby motel, and then drove to a gasoline station near the offices of the Company.

Tim Winston called Michael Noel. Noel testified that Tim Winston called him and asked “what this union stuff was about.” Noel replied that he had “joined the Union.” Tim

Winston asked why he would do that, that Noel "could have come to me if you had any problems." Noel answered that "it wasn't anything against him." Tim Winston replied that it "had everything to do with him," that Noel did it "behind his back." He told Noel to finish his call and come in and "turn in your stuff." Noel went to the motel where he and Gordon met Stahl, and they all then drove their trucks to the nearby gasoline station.

Tim Winston recalled that he asked Noel what was going on and claims that Noel, like Gordon, replied that "he was going to work for the Union." Tim Winston stated that he replied, "I don't know how you're going to work for the Union and for me, too." He told Noel to bring in his truck. As already noted, Noel had removed many of his personal tools the night before.

I do not credit the testimony of Tim Winston that Gordon and Noel said they were "going to work for the Union." As pointed out in the brief of the Charging Party, any such statement would have been untrue. Tim Winston's rote recitation that both said they were "going to work for the Union" and that he replied he did not know how they were going to "work for the Union" and him was not credible. He admitted that neither Gordon nor Noel said that they were quitting or resigning. Gordon's wanting "to be Union" and Noel's having "joined the Union" related to Union representation not employment. Tim Winston could not have honestly concluded otherwise.

David Winston, after speaking with Gordon, called James Stahl. He asked whether he had talked to the Union. Stahl answered that he had and that "it was going to be hot this summer and that we needed to talk about a lot of things." David Winston then told Stahl to bring his truck in. David Winston was asked whether he "felt that him [Stahl] being a member of the Union and being an employee of your Company were things that couldn't co-exist, correct?" David Winston answered, "Correct."

Stahl recalls that David Winston called him and asked "what the fuck was I trying to do to him." He stated that he knew Stahl was "behind this," that Gordon and Noel were "not smart enough to do this." Stahl replied that he "had signed the union card and that we'd all signed union cards together." David Winston stated that "wasn't going to happen," that Stahl "didn't have a job."

Shortly thereafter, Tim Winston called Stahl and told him to run the call he had been assigned and then return and turn in his truck. Stahl said, "[O]kay." After thinking about the fact that he had been terminated, Stahl felt that it would not be appropriate. He called Tim Winston back and explained that he "didn't feel it was appropriate" for him to run the call. Tim Winston called Stahl "a treasonous fucker and then told me to turn the vehicle in and come and see him face-to-face and see what happens."

Tim Winston claimed that Stahl called him. I do not credit that testimony. David Winston had discharged Stahl. Tim Winston was seeking to have Stahl, a discharged employee, make a service call. Tim Winston claims that he asked Stahl what was going on, but Tim Winston already knew what was going on, he had talked to Gordon and Noel. He recalled that Stahl replied that "this was the best route for him to go, it was in the best interest for everybody." Tim Winston told Stahl that "AC Specialists was not a union shop." Stahl answered that he thought it should be. Tim Winston replied that he told Stahl that he did not "know anything about unions" and that, if he wanted to work for unions, there was nothing he could do for him. Tim Winston did not deny telling Stahl, who had already been discharged by David Winston, to run a call, calling him a "treasonous fucker" or requesting that he come to see him "face-to-face and see what happens." I credit Stahl.

After the employees met together, they drove to the nearby gasoline station. Stahl explained that, after what had been said to them, "there was a high probability that they [the Winston's] were angry at us," so he called the office of the Hillsborough County Sheriff to have a deputy "escort us to the property."

Upon arrival at the facility, the service technicians parked their trucks. Tim Winston told Gordon and Noel that they could thank Stahl for "getting you guys fired." He told Stahl that "he couldn't believe you could do this to me" and said that he would ruin Stahl. Stahl replied that they "just wanted to work there, we wanted to negotiate this." Tim Winston twice told the police officer that he wanted him to arrest Stahl, initially the reason was for "having the Union." He then claimed that Stahl had his tools. Gordon, after turning in his keys and telephone, placed a union pin on his shirt. David Winston said to him, "I don't care about you putting your union pin on. We are not going to be union here." The three discharged employees left. As already noted, Gordon and Noel were reinstated in early April, a little more than a month after they were discharged. Stahl was not reinstated.

The Company had discharged Stahl in February because of an alleged unauthorized purchase and alleged misuse of a company vehicle. It is undisputed that the discharge was rescinded. Although the Company presented evidence relating to that discharge, Tim Winston acknowledged that he did not decide on March 9 to discharge Stahl for the alleged purchase or misuse of a vehicle. Asked whether Stahl was fired "because he had joined the Union," Tim Winston admitted, "He was fired mainly for that."

D. Analysis and Concluding Findings

1. The 8(a)(1) allegations

Paragraph 6 of the complaint alleges that David Winston, by telephone, (a) created the impression that employees' union activities were under surveillance, (b) interrogated employees about their union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees, (c) told employees that it was futile for them to choose the Union as their collective-bargaining representative, and (d) threatened employees with discharge because of their union activities.

Organizer Leggette informed David and Tim Winston that all three service technicians had signed union authorization cards and "fanned [them] out" for them to see. Whether they looked at the cards is immaterial. The employees knew that the Union was going to the Respondent's office to seek recognition. Stahl had, on behalf of the three unit employees, told Leggette to "take the cards" and seek representation. He informed Gordon and Noel that Leggette would contact the Company on March 9. The argument in the brief of the General Counsel that the employees had not "personally revealed" their union sympathies has no merit. The employees understood that their support of the Union would be revealed. Stahl even cautioned them that David Winston might fire them. David Winston's subsequent conversations with Gordon and Stahl confirming what he had been told did not constitute coercive interrogation. David Winston's comment to Stahl, that he knew he was "behind this," was explained by his reference to Gordon and Noel not being "smart enough to do this," not by surveillance of employee union activity. I shall recommend that subparagraphs 7(a) and (b) of paragraph 7 be dismissed.

David Winston told Jerome Gordon that "there wasn't going to be union here, this isn't a union shop, and if I wanted to be in a union, then I need to go get a union job." He

then told Gordon that he “needed to decide what I’m going to do.” The statement that “there wasn’t going to be a union here” threatened the futility of union representation. The statement that Gordon “needed to decide” what he was going to do threatened discharge because of his union activities. Both statements, as alleged in subparagraphs 6(c) and (d) of the complaint violated Section 8(a)(1) of the Act.

Paragraph 7 of the complaint alleges that Tim Winston, by telephone, (a) interrogated employees about their union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees, (b) threatened employees with discharge because of their union activities, (c) told employees that it was futile for them to choose the Union as their collective-bargaining representative.

Tim Winston called employee Mike Noel asking what this union stuff was about. Noel replied that he had “joined the Union.” Tim Winston told Noel that he could have come to him. Noel responded that “it wasn’t anything against him” Tim Winston replied that it “had everything to do with him,” that Noel did it “behind his back.” He told Noel to finish his call and come in and “turn in your stuff.” There was no threat of discharge. Tim Winston discharged Noel.

After David Winston told Jerome Gordon that he “needed to decide,” Gordon called Tim Winston and told him that he “wanted to be union.” Tim Winston asked whether he wanted to “run my service call and then turn my van in, or did I want to turn my truck in now.” Gordon replied that “if I’m being fired, then I should turn my truck in now.” There was no threat of discharge. Gordon was discharged.

As already discussed, insofar as Leggette had identified the service technicians as having authorized the Union to represent them, I find that no interrogations in that regard were coercive. Noel and Gordon were not threatened with discharge by Tim Winston. They were discharged. I shall recommend that subparagraphs 7(a) and (b) be dismissed.

Stahl had already been discharged when he spoke with Tim Winston insofar as David Winston had told him to bring his truck in. That was the reason that he felt it would be inappropriate for him to make a service call. Tim Winston admits telling Stahl that “AC Specialists was not a union shop.” Stahl answered that he thought it should be.” Tim Winston replied that he told Stahl that he did not “know anything about unions” and that, if he wanted to work for unions, there was nothing he could do for him.” The foregoing statement informed an unlawfully terminated employee that employees’ selection of the Union as their collective-bargaining representative was futile. In doing so the Respondent violated Section 8(a)(1) of the Act.

Paragraph 8 of the complaint alleges that David Winston, at the facility, (a) created the impression that employees’ union activities were under surveillance, (b) told employees that it was futile for them to choose the Union as their collective-bargaining representative, and (c) threatened employees with discharge because of their union activities.

There is no evidence of any statement by David Winston that created an impression of surveillance when the employees returned their trucks to the facility, and there was no threat of discharge. The employees had already been discharged. David Winston’s statement to Gordon that he did not care about his putting his union pin on his shirt, that “[w]e are not going to be union here,” did inform employees that their activities in support of the Union were futile. I shall recommend that subparagraphs 8(a) and (b) of the complaint be dismissed. By informing employees, as alleged in subparagraph 8(c), that selection of the Union as

their collective-bargaining representative was futile, the Respondent violated Section 8(a)(1) of the Act.

Paragraph 9 of the complaint alleges that Tim Winston, at the facility, (a) threatened employees with discharge because of their union activities and (b) threatened to have employees arrested because of their union activities.

The employees had, at the point that they returned the trucks, already been discharged. Thus there was no threat of discharge. I shall recommend that subparagraph 9(a) be dismissed.

The uncontradicted testimony of Stahl establishes that Tim Winston sought to have him arrested for “having the Union.” The officer had the good sense not to act upon that request. The request that Stahl be arrested for his union activity, as alleged in subparagraph 9(b), violated the Act.

2. The 8(a)(3) allegations

David Winston admitted that “being a member of the Union” and being an employee of his Company were “things that couldn’t co-exist.” The alleged misconduct of Stahl that resulted in his February discharge was condoned. The Respondent rescinded the discharge and continued Stahl’s employment. *United Parcel Service*, 301 NLRB 1142, 1143 (1991). When Tim Winston was asked whether Stahl was fired “because he had joined the Union,” he admitted, “He was fired mainly for that.”

The analysis prescribed in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), is applicable in dual motive cases. This is not a dual motive case. Union membership was incompatible with employment by the Respondent. The Respondent, by discharging James Stahl, Jerome Gordon, and Michael Noel because of their activities on behalf of the Union, violated Section 8(a)(1) and (3) of the Act.

3. The 8(a)(5) allegation

The Respondent, in its answer and at the hearing, argued that the Union was seeking an 8(f) prehire agreement. In its brief, the Respondent asserts that “A/C Specialists was entirely within its rights when it declined to enter into what it perceived to be a Section 8(f) pre-hire agreement.” There is no evidentiary basis for that assertion. Tim Winston told Stahl that he did not “know anything about unions.” If he did not know anything about unions he would not have known the difference between a prehire agreement and recognition pursuant to Section 9(a). Neither David nor Tim Winston mentioned Section 8(f) in their testimony. The Union’s presentation of signed authorization cards by employees in the existing work force is inconsistent with it seeking an 8(f) agreement.

As hereinafter set out, I find that the termination of all of the members of the bargaining unit because they “joined the Union,” warrants the imposition of a bargaining order. Nevertheless, the evidence establishes without any question that the Respondent never agreed to recognize the Union upon the presentation of evidence of a card majority. Thus there is no basis for any finding that the Respondent violated Section 8(a)(5) of the Act. *Terracon, Inc.*, 339 NLRB 221 (2003). Thus, I shall recommend that the 8(a)(5) allegation be dismissed.

E. Bargaining Order

The General Counsel and the Charging Party seek a bargaining order. In *NLRB v.*

Gissel Packing Co., 395 U.S.575 (1969), the Supreme Court identified two types of cases in which a bargaining order would be warranted: Category I cases in which the unfair labor practices were “outrageous and pervasive,” and Category II cases involving “less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process.”

The Respondent’s amended answer admits that a unit of service technicians is appropriate. Although the amended answer denies that an “uncoerced majority” of the employees in the unit designated the Union as their collective-bargaining representative, there is no evidence of any coercion. Each member of the appropriate service technicians bargaining unit confirmed that they had signed an authorization card designating the Union as their collective-bargaining representative. There is no issue with regard to majority status.

The Respondent argues that a bargaining order is not appropriate and cites the decision of the court of appeals in *Grandee Beer Distributors, Inc. v. N.L.R.B.*, 630 F.2d 928 (2d Cir. 1980), which denied enforcement of the bargaining order that the Board had imposed. That case is inapposite. In *Grandee Beer Distributors, Inc.*, 247 NLRB 1280 (1980), the employer had interrogated employees, threatened discharge, and promised a wage increase. No employee was discharged. In this case the entire unit was discharged.

The discharges of all of the members of a bargaining unit constitute “outrageous and pervasive” unfair labor practices. In this case, as in *Allied General Services*, 329 NLRB 568, 570 (1999), “the Respondent’s highest officials swiftly reacted with draconian actions that affected the livelihood of every one of the unit employees. Clearly, there is a strong likelihood that the Respondent’s unfair labor practices will have a pervasive and lasting deleterious effect on the Respondent’s employees’ exercise of their Section 7 rights.” The Board then set out the following language from a prior decision, *Cassis Management Corp.*, 323 NLRB 456, 459 (1997), enf’d. 152 F.3d 917 (2d Cir. 1998), cert. denied 525 U.S. 983 (1998):

Discharge of an entire bargaining unit is the ultimate retaliation for union activity, the final assault on the employment relationship. It is difficult to conceive of unfair labor practices with more severe consequences for employees or with more lasting effects on the exercise of Section 7 rights. Mass discharges leave no doubt as to the response that the employees will reasonably fear from their employer if, after reinstatement, they persist in their support for a union.

The decision in *Allied General Services* concludes with a finding that the foregoing conduct places the case “in the realm of those exceptional cases warranting a bargaining order under category I of the Gissel standard, such that traditional remedies cannot erase the coercive effects of the conduct, making the holding of a fair election impossible.”

In this case, the response to the recognition request of the Union was followed by threats of futility, discharge, and arrest in conversations that were laced with profanity and the discharge of the entire unit. As in *Allied General Services*, I find that “traditional remedies cannot erase the coercive effects of the conduct, making the holding of a fair election impossible.” I shall, therefore recommend the imposition of a bargaining order.

Conclusions of Law

1. The Respondent, by informing employees that selection of the Union as their collective-bargaining representative would be futile, threatening employees with discharge because of their union activities, and threatening employees with arrest because of their union

activity, violated Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. The Respondent, by discharging employees because of their union activity, violated Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

5

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

10

The Respondent, as already noted, reinstated Jerome Gordon and Michael Noel. The Respondent, having unlawfully discharged James Stahl, it must offer him reinstatement. The Respondent must also make James Stahl, Jerome Gordon, and Michael Noel whole for any loss of earnings and other benefits. Backpay shall be computed on a quarterly basis from March 9, 2012, to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).³

15

20

The Respondent must recognize and bargain with the Union.

The Respondent will also be ordered to post and email an appropriate notice.

25

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

30

The Respondent, AC Specialists, Inc., Tampa, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

35

(a) Informing employees that selection of the Union as their collective-bargaining representative would be futile.

(b) Threatening employees with discharge because of their union activities.

40

(c) Threatening employees with arrest because of their union activity.

(d) Discharging employees because of their union activity.

45

³ Gordon and Noel received backpay when they were reinstated. If the amounts they received did not make them whole, they shall be paid additional backpay. I shall leave for compliance the determination as to whether the amounts they received made them whole.

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer James Stahl full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make James Stahl, Jerome Gordon, and Michael Noel whole for any loss of earnings and other benefits they suffered as a result of their discharges, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from our files any reference to the discharges of James Stahl, Jerome Gordon, and Michael Noel and, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

(d) Upon request, recognize and bargain with United Association of Plumbers, Pipefitters & HVAC Refrigeration Mechanics, Local Union 123, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFLCIO as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time service technicians employed by Respondent at its Tampa, Florida facility, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Tampa, Florida, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 12 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since March 9, 2012.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. October 12, 2012

George Carson II
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT inform you that selection of the Union as your collective-bargaining representative would be futile.

WE WILL NOT threaten you with discharge because of your union activities.

WE WILL NOT threaten you with arrest because of your union activity.

WE WILL NOT discharge you because of your union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer James Stahl full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make James Stahl, Jerome Gordon, and Michael Noel whole for any loss of earnings and other benefits they suffered as a result of their discharges, with interest

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of James Stahl, Jerome Gordon, and Michael Noel, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL, upon request, recognize and bargain with United Association of Plumbers, Pipefitters & HVAC Refrigeration Mechanics, Local Union 123, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time service technicians employed by us at our Tampa, Florida facility, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

AC SPECIALISTS, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

201 E. Kennedy Blvd., South Trust Plaza, Suite 530, Tampa, FL 33602-5824, (813) 228-2641,
Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (813) 228-2455